

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 17, 2012

v

ELLIOT JAY COOPER,

No. 301616
Saginaw Circuit Court
LC No. 09-033303-FH

Defendant-Appellant.

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Defendant Elliot Cooper appeals his jury conviction of first-degree home invasion,¹ carrying a concealed weapon (CCW),² carrying a dangerous weapon with unlawful intent,³ discharge of a firearm at a building,⁴ felonious assault,⁵ and four counts of possession of a firearm during the commission of a felony (felony-firearm).⁶ The trial court sentenced Elliot Cooper to serve five to 20 years in prison for his first-degree home invasion conviction, 18 to 60 months in prison each for his CCW and carrying a dangerous weapon with unlawful intent convictions, 18 to 48 months in prison each for his discharge of a firearm at a building and felonious assault convictions, and two years in prison for each of his felony-firearm convictions. We affirm.

I. FACTS

This case concerns an incident that allegedly occurred on June 16, 2009, at Sharice Bell's home, where Bell lived with her two children and her boyfriend, Jonathan Edwards. Bell

¹ MCL 750.110a(2).

² MCL 750.227.

³ MCL 750.226.

⁴ MCL 750.234b.

⁵ MCL 750.82.

⁶ MCL 750.227b.

testified that she and Edwards got into an argument at the home at about 4:00 p.m. Bell believed that Edwards went to see his ex-girlfriend, Shameka Cooper, following the argument.

Bell's mother, Juanita Lefler, testified that someone knocked on the door of Bell's home at about midnight. Lefler answered the door, and a man and a woman asked for Bell. Lefler said that she shut the door and told Bell about the visitors.

Bell, her mother, a friend, and the children were at the home; Edwards had not yet returned. Bell said that she was not expecting any company. She testified that Shameka Cooper and her brother, Elliot Cooper, whom she had met before and was Edwards' friend, were at the door. According to Bell, when she cracked the storm door open to hear their voices better, they "grabbed the storm door" and "came rushing in." Bell said that she tried to close the front door but the deadbolt lock was sticking out and prevented the door from closing.

Bell said that Shameka Cooper attacked her, punching and kicking her, pulling her hair, and eventually getting on top of her on a chair and punching her in the face. Bell testified that Elliot Cooper said, "Nobody better not jump in it. This is going to be one on one," referring to the fight. According to Bell, her mother started to pull Shameka Cooper off of her, and Elliot Cooper then pointed a gray .22-caliber handgun at the ceiling and fired one shot. (Bell recognized the gun that Elliot Cooper used as Edwards' gun. She said she was sure it was Edwards' gun because she had seen him leave with it after the argument.) Bell said she was afraid that Elliot Cooper would shoot her after he fired the shot into the ceiling. She said Shameka Cooper briefly continued her assault, but Shameka Cooper and Elliot Cooper ran away shortly after the shot. Lefler and the friend who was present testified that the incident occurred essentially as Bell had described it.

Bell said that she then went to her sister's house because she was afraid. A few hours later, she returned to her house and called the police. Saginaw Police Department Detective Steve Lautner was dispatched to her house. Detective Lautner testified that Bell had injuries on one side of her face. Detective Lautner also saw a bullet hole in the ceiling and ceiling fragments on the floor under the bullet hole. After Bell told him what had occurred, Detective Lautner very briefly looked for the bullet casing, but was unable to find it. Detective Lautner's contemporaneous report of the incident indicated that Bell told him that she had first welcomed or invited the pair into her house.

Bell said that Edwards found the bullet casing a few days later but would not give it to her because he did not want her to give it to the police. She said that she found the bullet when she "stuck a kitchen knife in the [bullet] hole . . . wiggled it around, and it fell out." Bell said that she eventually found where Edwards had hidden the casing in the house. She turned the casing and bullet over to the police after she and Edwards broke up. Saginaw Police Detective Andrew Carlson, who was assigned to investigate the incident, opined that that the diameter and the grain of the bullet matched the casing. He said that he was not surprised that the bullet he received from Bell appeared undamaged because the plaster ceiling was not hard enough to mushroom the bullet.

Edwards provided a different account of how a bullet ended up in the ceiling:

It—what happened was—with the bullet hole that was in the ceiling, one day I was away from the home. I used to keep a gun in the house. [Bell] said that she thought somebody had came [sic] to the house. I don't know what happened, but she actually had got the gun, and she had cocked the gun and she was afraid that someone was trying [to] break in.

When I returned, she told me that she had cocked the gun and she didn't know what to do after that because she didn't you know—she didn't know how to disarm it. So when I got the gun, I didn't know that she actually had a bullet in the chamber. I knew it was cocked, but I didn't know a bullet was in the chamber, so when I tried to clear the gun, it fired off. It fired off a shot into the ceiling.

Elliot Cooper testified that he had never been to Bell's house and that he did not fire a gun into the ceiling of the home. Elliot Cooper denied knowing that Edwards had a gun. He testified that the witnesses were “mistaken” or “lying.”

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

When reviewing a sufficiency challenge, this Court reviews the evidence de novo, “in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt.”⁷ For this purpose, this Court must resolve all conflicts in the evidence in favor of the prosecution.⁸

B. LEGAL STANDARDS

This Court does not generally decide credibility issues but instead defers to the jury's credibility determinations.⁹ “Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime.”¹⁰ “An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient.”¹¹ It is sufficient if the prosecution proves its own theory beyond a reasonable doubt in the face of whatever

⁷ *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

⁸ *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

⁹ *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002).

¹⁰ *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

¹¹ *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citation omitted).

contradictory evidence the defense may produce. It is not necessary for the prosecution to disprove every reasonable theory of innocence.¹²

C. CCW CONVICTION

Elliot Cooper argues that because no one testified that the handgun was initially concealed, it may have been in plain view the whole time. This argument suggests that a conviction on CCW requires that someone see a concealed weapon. But concealment means not discernable by ordinary means in casual observation.¹³ By definition, then, one cannot see what is concealed. CCW convictions do not require that a witness specifically see the defendant produce a gun from a place of concealment. Here, an eyewitness testified that she did not see Elliot Cooper with a gun when he was on the porch or after he entered the house. Circumstantial evidence and reasonable inferences drawn from it can prove the elements of a crime.¹⁴

D. CARRYING A DANGEROUS WEAPON WITH UNLAWFUL INTENT CONVICTION

Elliot Cooper argues that the intent element was not satisfied because the gun was used to stop a fight, not to start one. However, a rational view of the testimony suggests that Elliot Cooper acted with something other than benevolent, peace-keeping intent. The evidence suggested that Elliot Cooper and Shameka Cooper entered the home forcibly and immediately became aggressive. In that context, Elliot Cooper's firing of a gun into the ceiling could be interpreted as a show of force intended, according to eyewitness testimony, to keep the fight going without interference from others.

E. DISCHARGE OF A FIREARM AT A BUILDING CONVICTION

Elliot Cooper challenges his conviction of discharge of a firearm at a building on the ground that there was no evidence he acted in reckless disregard for the safety of others because the ceiling presented a relatively safe surface at which to shoot. Elliot Cooper cites no authority for the proposition that a conviction requires the actor to shoot at a building surface that is hard enough to cause a projectile to ricochet, or that is otherwise especially dangerous. Moreover, there was no indication that Elliot Cooper gave careful thought to the peculiar properties of the ceiling material before electing to shoot at it. Elliot Cooper's hastiness and overall aggression in producing and firing his gun indoors, and in the presence of others, was sufficient to prove the requisite intent.¹⁵

¹² See *People v Hardiman*, 466 Mich 417, 424; 646 NW2d 158 (2002); *People v Johnson*, 137 Mich App 295, 303; 357 NW2d 675 (1984).

¹³ See *People v Kincade*, 61 Mich App 498, 502; 233 NW2d 54 (1975).

¹⁴ *Jolly*, 442 Mich at 466.

¹⁵ See *Fetterley*, 229 Mich App at 518 (minimum circumstantial evidence is sufficient because of difficulty in proving actor's state of mind).

F. FELONIOUS ASSAULT CONVICTION

Elliot Cooper argues that he made no threats. But the gesture of commanding obedience from others and then firing a gun as a display of force constituted an assault for purposes of that crime.

G. FIRST-DEGREE HOME INVASION CONVICTION

In challenging the conviction of first-degree home invasion, Elliot Cooper points out that Shameka Cooper was not prosecuted on this charge and that a police report indicated that Bell had said that she let Elliot Cooper into the house. However, that Shameka Cooper did not face identical charges illustrates nothing more than prosecutorial discretion. Moreover, the live testimony that Elliot Cooper and Shameka Cooper forced their way into the house was sufficient to prove the breaking and entering element, whether or not some unsworn other account indicated otherwise.

H. FELONY-FIREARM CONVICTIONS

Elliot Cooper's challenges to his convictions of felony-firearm are derivative of his challenges to the underlying felonies. Having found the latter challenges to lack merit, we conclude that this challenge likewise lacks merit.

III. EVIDENTIARY ISSUES

A. STANDARD OF REVIEW

Elliot Cooper argues that the trial court erred in admitting a bullet and casing into evidence and in allowing a police officer to testify as an expert. Because Elliot Cooper failed to object, we review this claim for plain error affecting substantial rights.¹⁶

B. THE BULLET AND CASING

Elliot Cooper argues that the bullet and casing should not have been introduced because there was no evidence connecting them with the alleged crimes. However, Bell identified the bullet as something she removed from the ceiling and turned over to the police, and identified the casing as something that her boyfriend had hidden but that she found and turned over to the police. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."¹⁷ The bullet removed from the ceiling and the casing underscored the testimony describing Elliot Cooper's discharge of a firearm at the ceiling. Defense counsel even recognized the relevance of the bullet, stating that, unlike this bullet, one

¹⁶ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

¹⁷ MRE 401.

would expect a bullet fired into the ceiling to have some damage or be mushroomed. The bullet and casing were therefore relevant and properly admitted.

C. POLICE OFFICER TESTIMONY

Elliot Cooper argues that a police officer gave improper expert testimony that a white substance on the tip of the bullet “appears to be like a plaster substance” and that it would be “very possible” for a bullet shot into a plaster substance not to mushroom or have any damage.

MRE 702 authorizes a trial court to admit evidence from a witness “qualified as an expert by knowledge, skill, experience, training, or education” where the court “determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue” In this case, the officer testified from his personal experience: “If [bullets] hit your bone, they tend to mushroom, but if they go in and [hit] somebody’s lung, which is a softer tissue, I’ve seen them come out where there’s been no damage at all.” The officer stated that he had investigated shootings where bullets hit drywall and plaster. This testimony was that of an investigating police detective calling upon his experience. Accordingly, we conclude that the trial court did not err in allowing the police officer to testify as an expert.

IV. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Elliot Cooper asserts that the prosecutor improperly expressed a personal belief in the facts of the case and the credibility of a witness, elicited a police officer’s opinion and comments about the credibility of another witness, and otherwise elicited irrelevant and prejudicial testimony. However, none of these objections were raised below, again restricting our review to whether there was a plain error affecting substantial rights.¹⁸

B. ELICITING HEARSAY TESTIMONY

Elliot Cooper points out that the prosecutor elicited testimony from the police officer who first arrived at the scene that the perpetrators were Elliot Cooper and Shameka Cooper. He argues that this testimony denied him a fair trial because it was hearsay, as an account of what someone else had told the officer, and irrelevant because it was merely cumulative. However, “[a] finding of prosecutorial misconduct may not be based on a prosecutor’s good-faith effort to admit evidence.”¹⁹ Further, had there been a hearsay objection in this situation, it would have been properly overruled.

The position of the defense was that Elliot Cooper was not involved at all in the June 16 shooting incident and that those testifying otherwise were lying. Evidence of a prior consistent

¹⁸ *Carines*, 460 Mich at 763-764.

¹⁹ *People v Abraham*, 256 Mich App 265, 278; 662 NW2d 836 (2003).

statement is not hearsay, but rather is admissible as evidence to assist in the assessment of a witness's credibility where that witness has been accused of a recent fabrication.²⁰ What Bell told the responding officer comported with her testimony at trial, thus rebutting the defense's charge of recent fabrication. Moreover, Elliot Cooper cites no authority for the proposition that once a matter is placed into evidence any overlapping evidence thereby becomes irrelevant.

C. INJECTION OF PERSONAL BELIEF

Elliot Cooper argues that the prosecutor improperly injected personal belief into his comments before the jury. "A prosecutor may not vouch for the evidence or place the weight of his office behind the prosecution; but . . . he may argue regarding the credibility of witnesses where the testimony conflicts and the result depends on which of the witnesses is to be believed."²¹ The critical inquiry is whether the prosecution urged the jury to suspend its own judgment powers out of deference to the prosecutor or police.²²

In this case, the prosecutor's closing arguments included the following:

But keep in mind, we also had . . . testimony . . . very similar in nature to [Bell's] testimony, so I submit that that corroborates [the latter's] testimony as to the events that occurred.

On the other hand, the defendant just got up here and testified, and basically all he said was I wasn't there, everybody else is lying, you know, all the prosecution witnesses are lying.

I find it hard to believe or, I guess, based on the evidence that three women would come into court and point to this defendant as being the guy that came in and fired the shot in the house as [Shameka Cooper] was beating up [Bell] when they had never even met the defendant, at least that's his explanation.

* * *

And I find [it] even more hard to believe that this defendant wouldn't know that [a boyfriend] was staying on Walcott Street with [Bell], so I submit to you that he was lying through his testimony, and obviously he's got the motivation and the reason to lie to try to get out of this case.^[23]

Elliot Cooper argues that the prosecutor's references to what he personally found believable violated his duty to refrain from vouching for the evidence. However, "provided the

²⁰ MRE 801(d)(1)(B).

²¹ *People v Foster*, 77 Mich App 604, 612-613; 259 NW2d 153 (1977).

²² *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995).

²³ Emphasis added.

prosecutor's . . . argument is based upon the evidence and does not suggest that the jury decide the case upon the authority of the prosecutor's office, the words 'I believe' or 'I want you to convict' are not improper."²⁴

In this case, the prosecutor was arguing based on the evidence and, though he lapsed into the first person, he fell far short of invoking the prestige of his office or urging the jurors to suspend their own judgment in deference to his. This argument was not misconduct and there was no unfair prejudice. Moreover, the trial court instructed the jury to decide the case solely on the basis of the evidence, and that the statements of counsel are not evidence.

D. ELICITING OPINION TESTIMONY ON CREDIBILITY

Elliot Cooper points to two instances where the prosecutor elicited opinions concerning the veracity of prosecution witnesses. It is improper for one witness to offer an opinion on the credibility of another.²⁵ In this case, the prosecutor elicited from a police detective that Bell's behavior was consistent with that of a victim, that he had no reason to disbelieve her account of the incident, and that what he observed on the scene appeared to corroborate her story. The detective thus touched upon the question of Bell's credibility, but only minimally. Saying that he had no reason to doubt her is not the same as saying that he thought her honest and truthful.

But the prosecutor also asked Elliot Cooper if Bell was lying in implicating him in the crimes, and he received an affirmative response. The rule against asking one witness to comment on the credibility of another extends to criminal defendants being asked to comment on the credibility of prosecution witnesses.²⁶ However, when a defendant handles such questioning well, suffering no prejudice in the matter, reversal is not required.²⁷ As in *People v Buckley*, this was "not a case where the defendant might have been prejudiced by improper bolstering of the credibility of prosecution witnesses"²⁸ Because our reading of the transcript shows that Elliot Cooper confidently confronted the fact that his testimony was entirely inconsistent with that of Bell and other prosecution witnesses, we can discern no harm. Further, a defense objection could have cured any prejudice by inducing the trial court to preclude any further such questioning or to provide a cautionary instruction.²⁹ Reversal is thus not warranted.³⁰

²⁴ *People v Jansson*, 116 Mich App 674, 693-694; 323 NW2d 508 (1982).

²⁵ *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

²⁶ *Buckey*, 424 Mich at 17.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 18.

³⁰ See *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008) ("Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." [internal quotation marks and citation omitted]).

V. SCORING OF THE GUIDELINES

A. STANDARD OF REVIEW

Elliot Cooper challenged the scoring of Offense Variable (OV) 3 and OV 4 at sentencing and renews the challenge on appeal. We note that “[a] sentencing court has discretion in determining the number of points to be scored [when calculating the sentencing guidelines], provided that evidence of record adequately supports a particular score.”³¹ Thus, this Court reviews the scoring to determine whether the sentencing court “properly exercised its discretion and whether the record evidence adequately supports a particular score.”³² “Scoring decisions for which there is any evidence in support will be upheld.”³³ This Court reviews de novo issues involving the interpretation or application of the statutory sentencing guidelines.³⁴

B. OV 3

The trial court assessed Elliot Cooper five points for OV 3, which is appropriate where “[b]odily injury not requiring medical treatment occurred to a victim.”³⁵ Elliot Cooper argues that the trial court erred in scoring any points under OV 3 because Shameka Cooper caused the physical injury, and Elliot Cooper was never charged as an aider and abettor. However, Elliot Cooper cites no authority for the proposition that a defendant may not be scored for assisting unless he was criminally charged and prosecuted on an aiding and abetting theory. To the contrary, a scoring decision should not be reversed if any evidence exists to support the score.³⁶ In this case, the testimony from Bell, as corroborated by others, indicated that Elliot Cooper was acting in concert with Shameka Cooper on the occasion in question. The trial court properly assessed five points for OV 3.

C. OV 4

The trial court assessed Elliot Cooper ten points for OV 4, which is appropriate if there is evidence that the victim suffered “serious psychological injury” that “may require professional treatment.”³⁷ Elliot Cooper disputes the trial court’s finding of *serious* psychological injury. In assessing the score, the trial court relied primarily on Bell’s victim impact statement, which included the following:

³¹ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

³² *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

³³ *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

³⁴ *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

³⁵ MCL 777.33(1)(3).

³⁶ *Hornsby*, 251 Mich App at 468.

³⁷ MCL 777.34(1)(a).

I'm afraid in my own home! I'm afraid for my life and the life of my children. My kids can't even go outside to play or ride their bikes because of my constant fear the defendant will come at anytime and try to kill me or my kids. I can't sleep at night ever since the event took place. . . . I constantly look out of windows in my home to assure myself that no one is there.

* * *

I'm still very afraid for my life and those around me. I replay that event in my head everyday when my thoughts begin to wander. I have anxiety attacks frequently now because my stress level is so high & I have so many triggers due to this event.

Bell also reported that “the children have also been affected emotionally; [t]hey cry because they're afraid he might come in through their bedroom window!”

This account was sufficient to support the trial court's finding that the victim suffered a serious psychological injury. Again, this Court will uphold scoring decision for which there is any evidence in support.³⁸

VI. ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Elliot Cooper argues that defense counsel was ineffective for failing to object in connection with the various unpreserved issues raised in this appeal. A claim of ineffective assistance of counsel is a mixed question of law and fact.³⁹ We review a trial court's findings of fact, if any, for clear error, and we review the constitutional issue arising from an ineffective assistance of counsel claim de novo.⁴⁰ Because Elliot Cooper did not move for a new trial or a hearing on a claim of ineffective assistance, this Court's review is limited to mistakes apparent on the record.⁴¹

B. LEGAL STANDARDS

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.⁴² To establish such a claim, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional

³⁸ *Elliott*, 215 Mich App at 260.

³⁹ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

⁴⁰ *Id.*

⁴¹ *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

⁴² *LeBlanc*, 465 Mich at 578.

norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.⁴³

C. ANALYSIS

To the extent we have concluded that Elliot Cooper has failed to identify any error in connection with the issues he raised, we conclude that defense counsel was not ineffective for failing to raise objections. Counsel need not advocate a meritless position.⁴⁴ Otherwise, Elliot Cooper has failed to show that he suffered any prejudice as the result of any deficiency in counsel's performance. Accordingly, we conclude that Elliot Cooper was not deprived of the right to effective assistance of counsel.

We affirm.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Michael J. Kelly

⁴³ *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

⁴⁴ *Mack*, 265 Mich App at 130.